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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES R. BREYER

STEPHANIE ENYART,)	
)	
Plaintiff,)	
)	
VS.)	No. C 09-5191 CRB
)	
NATIONAL CONFERENCE OF BAR)	
EXAMINERS, INC.,)	
)	San Francisco, California
Defendant.)	Tuesday
)	October 11, 2011

TRANSCRIPT OF PROCEEDINGS

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P R O C E E D I N G S

OCTOBER 11, 2011

10:07 A.M.

THE CLERK: Calling case C 09-5191, Stephanie Enyart versus National Conference of Bar Examiners.

Appearances, Counsel.

MR. TENHOFF: Good morning, Your Honor. Greg Tenhoff for the defendant National Conference of Bar Examiners.

THE COURT: Good morning.

MS. LEVINE: Good morning, Your Honor. Anna Levine from Disability Rights Advocates for Stephanie Enyart.

MR. LaBARRE: And Scott LaBarre for Stephanie Enyart.

THE COURT: Good morning.

This matter is on for summary judgment. My understanding is that the Supreme Court denied cert. Is that correct?

MR. TENHOFF: That is correct, Your Honor.

THE COURT: So we now have the law of the case, essentially, right? And the law of the case provides for a standard for an accommodation that will best ensure -- the examination is selected and administered so as to best ensure that when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level, or whatever other factor the

1 examination purports to measure, rather than reflecting the
2 individual's impaired sensory, manual, or speaking skills.

3 So that's called the "best ensure" standard. Is
4 there any issue as to that?

5 **MR. TENHOFF:** There isn't, Your Honor.

6 I think the question here is as applied and how to
7 apply it because we -- you may be the first Court who has to
8 apply that standard.

9 **THE COURT:** Well, okay. So in your brief --

10 **MS. LEVINE:** Your Honor, if I may be clear, do you
11 mean our moving brief, or the opposition?

12 **THE COURT:** Opposition brief.

13 You suggest that the test is whether or not there is
14 a reasonable alternative accommodation rather than the best
15 ensure standard.

16 **MR. TENHOFF:** Actually, Your Honor --

17 **THE COURT:** That's what I don't understand. If you
18 accept the standard of the Circuit, why do you argue that?

19 **MR. TENHOFF:** Well, two things, Your Honor.

20 First of all, the brief was submitted prior to the
21 ruling on our petition for cert.

22 Secondly, I believe we entitled all of our arguments
23 that even if a best ensure standard applied, that there are
24 disputes of material fact that would preclude summary judgment.

25 **THE COURT:** Yeah, I'm first going to the standard.

1 **MR. TENHOFF:** Correct.

2 **THE COURT:** Then I'll go to whether there's a
3 material issue. But as to the standard, the standard is best
4 ensure.

5 **MR. TENHOFF:** That is correct, Your Honor.

6 It's our position that that standard needs to be an
7 objective standard based on all the evidence, and not simply
8 upon Ms. Enyart saying, I believe this best ensures, this is
9 measuring my aptitude and, therefore --

10 **THE COURT:** Well, we'll get to that. That's a
11 question of whether or not, basically, under the -- with the
12 experts, whether or not there is a material dispute as to the
13 accommodation, which accommodation would best ensure the person
14 for passing.

15 **MR. TENHOFF:** Well, actually, Your Honor, it's
16 best ensure --

17 **THE COURT:** Or best ensure that the disability
18 doesn't play a role in connection with her ability to pass.

19 **MR. TENHOFF:** Correct. You're measuring aptitude,
20 not disability.

21 **THE COURT:** Right.

22 **MR. TENHOFF:** That's what best ensures that.

23 **THE COURT:** Okay. So, therefore, I should disregard
24 your language and your argument to the extent you challenge the
25 best ensure standard.

1 **MR. TENHOFF:** That's correct, Your Honor.

2 **THE COURT:** Okay. Well, I have reviewed the -- then
3 moving on, I've reviewed the expert's testimony.

4 Did you have an expert testify or give a deposition?

5 **MR. TENHOFF:** We had -- Dr. Damari submitted a
6 declaration in connection with the motion for preliminary
7 injunction way back in January of 2010, which we've cited in
8 our papers.

9 **THE COURT:** Doctor who?

10 **MR. TENHOFF:** Dr. Damari.

11 **THE COURT:** Damari.

12 **MR. TENHOFF:** And part of what we've also put into
13 evidence is excerpts from Dr. Sarraf's deposition, who was the
14 treating -- the treating ophthalmologist for Ms. Enyart. And
15 we've specified issues we have with his testimony. And, in
16 fact, I don't think he's actually even prepared to opine as to
17 whether these accommodations are the only ones that would best
18 ensure that.

19 **MS. LEVINE:** Your Honor, actually, that's a
20 misrepresentation of the evidence.

21 Dr. Sarraf was not put into evidence for the purpose
22 of affirming the best insurer standard. There were other
23 experts who did.

24 But, in deposition, he stood by his sworn testimony
25 in the Form B statement that she needs this accommodation. And

1 when the best ensure standard was put to him in deposition, he
2 affirmed it.

3 **MR. TENHOFF:** Your Honor, when Dr. Sarraf testified
4 that the form that was filled out, was filled out by
5 Ms. Enyart, he signed it.

6 But, perhaps more importantly, that recommendation --
7 this is the only mechanism by which she can read and process
8 information on the exam -- was based solely upon what
9 Ms. Enyart told him. Again, not on her medical condition. Not
10 on his expert testimony. Not on his expert opinion.

11 And, again, that comes down to looking at the
12 standard as applied. Is it sufficient for Ms. Enyart to simply
13 say, I believe this accommodation best ensures that we're
14 measuring my aptitude, or does there have to be more than that?

15 It's our position there has to be more than that.
16 Otherwise, there's no standard at all.

17 **THE COURT:** I didn't understand Dr. Sarraf's
18 expertise to go to the question or being inquired into as to
19 the best ensure standard.

20 **MS. LEVINE:** That's correct, Your Honor. He was
21 submitted for two points, which is basically her diagnosis and
22 her acuity, that she's blind.

23 **THE COURT:** And neither of those is challenged.

24 **MS. LEVINE:** Neither is challenged.

25 **THE COURT:** Right. I don't think you take an expert

1 and by asking a question, that's really what you're using the
2 expert for. He was not proffered for that purpose. So putting
3 him aside, who do I look at to -- what expert did you provide?

4 **MR. TENHOFF:** Dr. Damari is -- had put in a
5 declaration in connection with the preliminary injunction. And
6 what Dr. Damari said was, it's my opinion, based upon a review
7 of her medical records, that, in fact, she can read and process
8 information based upon these other methods of accommodation
9 primarily because, A, she successfully used those in the past;
10 and, B, that her medical condition hasn't changed, as evidenced
11 by not only her medical records but also Dr. Sarraf's testimony
12 in August of 2011.

13 In -- opposing that is Frederick Schroeder, who's
14 never examined and is not a treating physician of any kind.
15 And also, I believe it's Mr. Britton who, again, in his
16 deposition said, I came to this conclusion because this is what
17 Ms. Enyart told me.

18 Again, is it sufficient for her to say --

19 **THE COURT:** Before we get there, let's talk about
20 Dr. Damari.

21 **MS. LEVINE:** Your Honor.

22 **THE COURT:** Did Dr. Damari have an opinion as to the
23 best ensure standard?

24 **MR. TENHOFF:** He did not as to the best ensure
25 standard.

1 **THE COURT:** Okay. So I don't look at his testimony
2 as creating a material fact as to whether or not there is a
3 dispute as to -- as to what accommodation would bring about the
4 best ensure -- meet the best ensure standard. I don't look at
5 it for that. Maybe I can look at it for something else, but I
6 don't look at it for that. Is that correct?

7 **MR. TENHOFF:** That is correct.

8 **THE COURT:** Okay. That being correct, where do I
9 look at any testimony that you produced in order to determine
10 whether or not the best ensure standard is met by these types
11 of accommodations that have been suggested by the plaintiff?

12 **MR. TENHOFF:** I think what you can look at, Your
13 Honor -- and it's, I believe, the first argument in that
14 section -- is when you look at -- and, again, it is a material
15 fact when what this Court has been told has been that the
16 combination of screen reading JAWS and ZoomText is the only way
17 she can effectively read and process information.

18 **THE COURT:** Maybe I don't care "is the only way."
19 Maybe what I have to do is look at to see whether or not there
20 is a dispute as to whether that way, whether the way that has
21 been suggested, would or would not best ensure the
22 accommodation that's required.

23 And my question to you is: Where does the evidence
24 in the record suggest that that way, not some other way, but
25 that way will not best ensure?

1 **MR. TENHOFF:** The evidence is in the following form:
2 On one side we look at what Ms. Enyart had done in the past
3 with different accommodations. The fact that she graduated
4 from Stanford using live readers. All her work on the LSAT
5 prep, all her work on the LSAT, all her work in law school, all
6 the law school exams, all of those, as laid out in the brief,
7 that says this is what she used before successfully. And very
8 successfully. And here's what we compare it to.

9 She's now taken the MBE twice with JAWS and ZoomText.
10 She's taken it three times. We only know two scores. Both of
11 those times she scored in -- below the 5 percentile nationwide.

12 So how do we explain the discrepancy where someone
13 says this best ensures you measuring my aptitude with the fact
14 she performed so well with these other accommodations through
15 her lifetime -- academic testing lifetime -- and how she's
16 doing now with the accommodation she requires.

17 And there's actual evidence before this Court that
18 what Ms. Enyart has said in the past is, I am now fully
19 dependent on learning by listening. That's what she said to
20 UCLA, twice. And that evidence is in the record.

21 So here we have someone who, when she's taking exams
22 using those mechanisms, was doing well. Now she's using these
23 mechanisms and not doing well. It creates a dispute of fact as
24 to what -- are we measuring the disability or not?

25 If she cannot visually see the text or for some

1 reason the ZoomText is not --

2 (Interruption.)

3 **THE COURT:** I have to excuse myself. I'm sorry.
4 I'll be five minutes.

5 (Pause)

6 **THE COURT:** Sorry. I don't usually do that.
7 So, we can go right ahead.

8 **MR. TENHOFF:** Thank you, Your Honor.

9 Let me just make two final points when we're talking
10 about the difference between past successful use with other
11 accommodations and how she's performing on the MBE.

12 First of all, we put evidence before the Court,
13 primarily through Dr. Sarraf, her treating ophthalmologist, and
14 her medical records, that the medical condition hasn't changed
15 during the times that she was successfully using those
16 accommodations.

17 Secondly, there's something very unique about the
18 accommodation that she's asked for here. I actually asked
19 Dr. Sarraf in his deposition:

20 "Have you ever had another patient with
21 macular degeneration" -- which is what she
22 has -- "request from you a recommendation
23 that requires this synchronized audio and
24 video input, the JAWS and ZoomText
25 combination?"

1 "No.

2 **"QUESTION:** Ms. Enyart is the only one you've
3 heard that from?

4 **"ANSWER:** Yes."

5 So here is when we're looking at directly the
6 application of a subjective standard. Now she's saying, I
7 believe this best ensures.

8 Do we have to take that at face value or do we have
9 to make our own determinations?

10 It's our belief that that's an issue for this Court
11 to decide at trial and not on summary judgment.

12 **MS. LEVINE:** Your Honor, if I may, I'd like to go
13 back to the experts, because what defendant has thrown out at
14 you is a whole lot of isolated information that is not
15 connected in any way to the legal standard in a way that would
16 allow an adverse inference to be drawn. And there's a reason
17 for that.

18 I would like to point, first, to who we have. The
19 defendant has pointed to Schroeder and to Britton regarding the
20 best ensure standard. There was an additional expert, who was
21 Solano Rainy. She was not even challenged by defendant. They
22 did not address her expert testimony at all in their opposing
23 brief. On her record alone, this Court could grant summary
24 judgment.

25 Now, moving from that to the isolated sort of

1 instances of information, I think we need to think about what
2 the standard is for summary judgment. The standard is whether
3 there is a genuine dispute of material fact.

4 Now, they have pointed to past use of readers.
5 There's no dispute about that. She did use readers at Stanford
6 and at UCLA Law School. She used --

7 **THE COURT:** Look. Look. Look, one thing that's
8 common to everybody, we've all taken the Bar. I think the Bar
9 is nearly sui generis. I mean, there's nothing as horrible as
10 the Bar.

11 (Laughter)

12 **THE COURT:** Unless you have to take it a second time.
13 You know, the pressures are enormous. It's a win/lose
14 situation. There are no second places. It is fraught with an
15 enormous amount of emotional and psychological impact on nearly
16 every level. I say "nearly," because my brother didn't have a
17 problem with it.

18 (Laughter)

19 **THE COURT:** On the other hand, I did, in the terms of
20 going through it. And I have a sense, and I'm sure it's a
21 sense shared by everybody, both lawyers, that there is
22 something very special about it.

23 She passed this at Stanford, and did this and did
24 that. I understand that. But the situation -- and I
25 understand those are testing, and they're testing on the

1 academic subjects in which she's being tested on on the Bar.

2 And I understand there are a number of similarities.

3 But there's also a major, major difference. I mean,
4 I don't know. You say she's -- I don't know that I look at how
5 well she's done on the MBE or anything else to try to figure it
6 out. You know, is the accommodation not working? I don't -- I
7 don't know what inferences one draws from all of that. I'm not
8 sure that that's a fair thing for me to do or that I should
9 even consider it.

10 **MS. LEVINE:** We absolutely agree, Your Honor.

11 And, in particular, if defendant wanted to try to
12 draw something from her experience on the MBE, they needed to
13 introduce evidence on that point. The record is closed.
14 Nothing is going to come forward at trial that would change
15 that.

16 I don't know if they propose putting her on the stand
17 and having her take the LSAT with a computer-based
18 accommodation and then the Bar with the computer-based
19 accommodation. Even that, I'm not certain what that would
20 show.

21 What we can know is what her primary reading method
22 is that has -- is something that there is a great deal of
23 evidence in the record on, and what she's familiar with.

24 And on the importance -- and we can know the
25 importance of the primary reading method that's -- we have

1 expert opinion on that point.

2 **MR. TENHOFF:** Your Honor, if I may, two points.

3 First of all, we did object to Ms. Rainy's declaration when she
4 first put it in way back when in the preliminary injunction
5 standard (sic).

6 Secondly, the most relevant comparison in our mind --

7 **THE COURT:** I'm sorry, you say you -- you did what?

8 **MR. TENHOFF:** When -- Ms. Rainy submitted the
9 declaration back in conjunction with the first preliminary
10 injunction motion, and we submitted objections to her testimony
11 on lack of foundation and many other grounds. So, that's in
12 the record. So, there is objections to that testimony.

13 **THE COURT:** So, I have to deal with the foundational
14 objections.

15 **MR. TENHOFF:** It is in the record, yes, Your Honor.

16 But, secondly, we think when you actually look at
17 the -- when you actually look at what's relevant -- remember
18 we're only talking about one portion of the Bar Exam.

19 The essay portion and performance portion, she has
20 JAWS and ZoomText. She takes it that way each time. That has
21 nothing to do with what we're talking about.

22 We're talking about the MBE section, which is a
23 six-hour multiple choice exam. The LSAT is a four-hour
24 multiple choice exam. She did great on the LSAT with the same
25 medical condition and a reader accommodation, and she's having

1 this much difficulty on the MBE. We have to say, why is that?

2 **MS. LEVINE:** Your Honor --

3 **MR. TENHOFF:** And there's been nothing that's been
4 set forth by any expert to explain that discrepancy. Why is
5 that the case? Is this, at the end of the day, the best
6 method?

7 **THE COURT:** Well, you're asking the question why,
8 because of the inference you want drawn from it. And the
9 answer to it, in your view, is that this is not an -- this
10 accommodation doesn't work in the sense -- well, what are you
11 saying? You're saying that this --

12 **MR. TENHOFF:** If what we're going to look at, Your
13 Honor, is what is the accommodation that accurately -- that
14 best ensures that we're measuring aptitude. That's our
15 standard; we all agree on that.

16 And if we're going to do that, then don't we have to
17 understand why there's a big discrepancy there? And there's no
18 evidence from their side explaining that discrepancy. And
19 we've got a dispute of material fact as to the ultimate issue
20 in this case.

21 **MS. LEVINE:** Your Honor, they're saying up is down.
22 They're saying that there is no evidence explaining a
23 discrepancy that they think is a discrepancy and is relevant.

24 If they wanted to submit evidence to suggest that
25 this is a relevant -- that this is a reasonable inference they

1 want to draw from it and that it's relevant to the best ensure
2 standard, they could have submitted expert evidence on this
3 point.

4 We've given our expert disclosures for trial, and
5 they stand on their Damari declaration from the preliminary
6 injunction. That is the evidence for trial. It's the
7 evidence, at this point, and it draws no inference that they
8 wish to draw from that.

9 **MR. TENHOFF:** Well, Your Honor, you don't need an
10 expert to see -- you know, as Bob Dylan said says, you don't
11 need a weatherman to see which way the wind blows.

12 The fact of the matter is this: She took similar
13 exams throughout her academic career with a different
14 accommodation and did well. She took the MBE with the
15 accommodation she demands and did very poorly.

16 **MS. LEVINE:** They're absolutely --

17 **MR. TENHOFF:** You can draw an inference from those
18 mere facts that perhaps, just perhaps this is not, despite what
19 she says, the best accommodation for her.

20 **THE COURT:** I don't know that you draw that. I don't
21 know that it follows from that. I mean, I -- that's what I --

22 **MS. LEVINE:** Your Honor --

23 **THE COURT:** A recent dean of Stanford Law School took
24 the Bar and failed. Okay. What am I supposed to draw from
25 that?

1 Let's say you were standing in front of me and
2 saying -- did you go to Stanford, by the way?

3 **MR. TENHOFF:** No, I went to --

4 **THE COURT:** All right. So you can talk about it.

5 (Laughter)

6 **THE COURT:** To me, here's a person, a preeminent --
7 you know, a legal scholar doesn't pass the Bar. Well, why not?
8 Why not? Did she study the wrong things? Is she not very
9 bright? Why not? I don't know. There's so many whys that I
10 think that's a big vacuum of unknowns.

11 I don't know that I look at a difference in
12 performance and can come to the conclusion that this isn't a
13 method, the best method or the method that will best ensure her
14 passage.

15 I don't think you can look at it that way because if
16 that's the case, if that's the case, then I don't know what it
17 teaches you. But I guess you try it a couple of times and get
18 rid of it altogether because she didn't pass.

19 **MR. TENHOFF:** Well, Your Honor, also, it's -- that's
20 not the only disputed fact in this case.

21 **THE COURT:** I don't know that that's a dispute.
22 That's what I'm saying. I don't understand what the dispute
23 is. She didn't pass or did poorly on it doesn't -- doesn't
24 dispute -- doesn't raise an issue as to whether or not this
25 accommodation best ensures it.

1 **MS. LEVINE:** Your Honor, I think -- I believe --

2 **MR. TENHOFF:** Your Honor --

3 **MS. LEVINE:** -- Ms. Enyart would like to know, more
4 than anyone, why she didn't pass the Bar Exam. She does not
5 dispute that she did poorly on the Bar Exam, and she wishes she
6 had done better.

7 And we may never know, and would not know if we went
8 to trial, why she did poorly on the Bar Exam.

9 **THE COURT:** The answer is, she'll either pass or
10 won't pass. Nobody is suggesting there ought to be a different
11 scoring system. Even with these best ensure methods, she
12 didn't pass.

13 So the question is, should she try it again? I
14 assume she is trying it again.

15 **MS. LEVINE:** And we could also point to things like
16 the public pressures of -- if we're speculating, to the public
17 pressures of litigation, to technological problems that slowly
18 have been resolved in this past --

19 **THE COURT:** Well, the past time she took the Bar, it
20 was by consent, wasn't it, keeping the --

21 **MR. TENHOFF:** What happened was the injunction --
22 there was two -- a total of three injunctions. And so the last
23 one, we don't know the results, Your Honor.

24 But, again, our point is, if you have the same
25 aptitude and you're getting very different results with two

1 different mechanisms, that you can find there's a dispute of
2 fact as to whether the one you're doing poorly with is truly
3 the one that best ensures you're measuring that aptitude.

4 **MS. LEVINE:** But the question is, the same aptitude
5 on what?

6 **THE COURT:** Pardon?

7 **MS. LEVINE:** The same aptitude on what, would be the
8 question. And the answer -- and they have not submitted any
9 evidence to suggest that the Bar Exam is comparable in length,
10 complexity, subject matter tested to any of the things to which
11 they would compare it.

12 **MR. TENHOFF:** Well, I'm hoping it's commensurate with
13 what she did in law school.

14 **THE COURT:** I don't know. That was exactly my point
15 with Kathleen Sullivan. I think she probably did very well in
16 law school. What's your explanation for that?

17 **MR. TENHOFF:** For Miss Sullivan?

18 **THE COURT:** Yeah.

19 **MR. TENHOFF:** I would hate to speculate, Your Honor.
20 I think it was disputed --

21 **THE COURT:** Right. You would hate to do it, and I
22 would, too.

23 **MR. TENHOFF:** But that's --

24 **THE COURT:** But almost, in a way, you're asking me to
25 do it here. And I don't know about the discrepancy. I don't

1 know. But I don't know that it necessarily is tied in some way
2 to the accommodation.

3 It may be that she doesn't know -- I mean, with all
4 due respect, she doesn't know the law or that this is an
5 extraordinarily -- you know, I don't know why people don't pass
6 the Bar. I think some people don't pass the Bar because they
7 don't know the law.

8 Some people don't pass the Bar because they do very
9 poorly in exam, though they might make great lawyers. I mean,
10 there's a whole collection of reasons why people don't pass the
11 Bar. And I don't know that it proves or it is some evidence of
12 the failure of the accommodations to meet the standard that is
13 suggested here.

14 **MS. LEVINE:** And, Your Honor, she's passed the MPRE.
15 I mean, that is, she got the accommodation that -- the
16 computer-based accommodation on the MPRE portion -- sorry, the
17 Multistate Professional Responsibility Examination, which is a
18 shorter exam. And she got them on the Bar Exam. And she
19 passed one the second time, and the other she hasn't passed
20 yet.

21 What do we make of this? Again, who knows? It would
22 be entirely speculative.

23 **THE COURT:** There's no question that you could have
24 some scientific study of this. But this is a one-person
25 scientific study, and so you can't really do it. And that's

1 why I'm not sure, scientifically, you can draw the types of
2 inferences that you think ought to rise to credible evidence of
3 a material issue of fact as to whether or not these
4 accommodations meet the best ensure standard.

5 That's the argument on that. I can work my way
6 through that. I don't think the burden is -- you met the issue
7 on the burden. I mean, it's a margin of burden. It's a burden
8 by the way -- the way I'm looking at it, you're probably about
9 to pass it on -- if I ordered it, you'd pass it on to the
10 states to have to pay for it in connection with the
11 administration of the test.

12 **MR. TENHOFF:** Your Honor, two points. One is that if
13 we're all here in this courtroom today and we don't know the
14 answer to that question as to why there is that discrepancy,
15 then how do we not have a dispute in material fact --

16 **THE COURT:** Oh, no, that's not the test. I mean, I
17 know there's no world peace, but I don't know that I'm going to
18 have a trial on it. No, no, no.

19 I don't know why she didn't pass the Bar. I don't
20 know why a lot of people don't pass the Bar.

21 **MS. LEVINE:** A jury --

22 **THE COURT:** And I don't know that a jury is going to
23 know why she didn't pass the Bar. And I don't know that I
24 would instruct the jury to, Please tell me why she didn't pass
25 the Bar, in your opinion. I don't think that's the

1 fact-finding issue that is presented to a jury.

2 I think the question is, I have the experts, I have
3 your objections to the experts. I know what experts were out
4 there, that is proffered in connection with these issues. And
5 I think I'm simply going to decide the case based upon the
6 record in front of me. I think I'm in a position to do so.

7 (Simultaneous colloquy between counsel which was not
8 reportable.)

9 **MS. LEVINE:** Your Honor, there are one or two other
10 things I'd like to point out about the experts. One inference
11 that defendant seeks to want to draw from this sort of
12 scattering of documentary and other evidence is that Ms. Enyart
13 doesn't need visual input. This is something defendant has
14 just again reiterated in argument.

15 I'd like to point out that their own expert has
16 rebutted that. In multiple places in his deposition, he said
17 that she admitted that she needs visual and auditory input. So
18 any inference -- and, moreover, logic rebuts that inference
19 because they -- NCB has offered as an accommodation a CCTV, a
20 closed-captioned television, or large print font.

21 So the inferences are simply not logical and not
22 valid in light of the expert evidence.

23 And I'd like to go back to the evidentiary objection
24 because we have to look at the record as a whole. And the
25 record as a whole is not just Solano Rainy. It's not just

1 Frederick Schroeder and as to his creditability, and
2 Dr. Britton's credibility. We've talked about that in our
3 briefing. That doesn't defeat a motion for summary judgment.

4 And, moreover, in terms of Britton's credibility and
5 whether he solely relied on what Ms. Enyart told him, it's
6 simply not what is in evidence. He -- what is in evidence is
7 that to some extent he relied on that. There's no evidence
8 from NCBE that that's an invalid -- that patient report is
9 invalid. But he also relied on watching her, on examining her
10 in person. Something their own expert did not do. And he
11 looked at the documentary evidence.

12 Now, I am, again, looking at the experts on their
13 side. You have Dr. Damari, who has no opinion as to best
14 ensure, who said that it is really impossible for me to use the
15 best ensure standard --

16 **THE COURT:** Well, he has no opinion.

17 **MS. LEVINE:** He has no opinion.

18 **THE COURT:** I don't know why I would consider him.
19 He has no opinion on that subject. So, fine, he has no
20 opinion. You take him, you put him to the side.

21 **MS. LEVINE:** We actually agree.

22 **THE COURT:** That's the way you do it. Somebody comes
23 in and says, I have an opinion and this is what my opinion is
24 and this is what it's based on; he has an opinion. And you
25 take his opinion. You see whether or not that opinion is

1 different from the other person's opinion. And it creates a
2 triable issue of fact.

3 Dr. Damari didn't have an opinion on that.

4 **MS. LEVINE:** And so we --

5 **THE COURT:** If the question was simply to make a
6 reasonable accommodation, that's not the issue. The issue here
7 is that would best ensure, an accommodation that would best
8 ensure.

9 **MS. LEVINE:** We agree.

10 **MR. TENHOFF:** Your Honor --

11 **THE COURT:** Yes.

12 **MR. TENHOFF:** -- if I may, two final points. I
13 appreciate it. I know you have a long calendar.

14 **THE COURT:** No, I don't have a long calendar. A
15 short calendar. That's all right.

16 **MR. TENHOFF:** There are other disputes of material
17 fact that we've laid out in our brief.

18 **THE COURT:** What else?

19 **MR. TENHOFF:** These are -- and they're all in our
20 brief. They are whether Ms. Enyart only used JAWS and ZoomText
21 in law school. They are --

22 **MS. LEVINE:** I'm sorry. We concede that she did not
23 only use JAWS and ZoomText in law school. There is no dispute
24 there.

25 **MR. TENHOFF:** Well, Your Honor, we have declarations

1 from Ms. Enyart saying that that's what she did.

2 **THE COURT:** They're not disputing it.

3 **MR. TENHOFF:** I understand, but it --

4 **THE COURT:** That's not a material issue of dispute,
5 where one side comes in and says, We think this happened, and
6 the other side says, You do? So do we. That's not actually a
7 dispute.

8 **MR. TENHOFF:** But the credibility of Ms. Enyart is a
9 dispute of fact. When she puts a statement in under penalty of
10 perjury before this Court, which is incorrect and --

11 **THE COURT:** Well, there may or may not be a dispute
12 of fact depending on -- on to what extent I'm considering her
13 credibility in making a determination. That's right. I don't
14 disagree with that. That is to say, a witness's credibility
15 may be in dispute.

16 But if ten people say X, and an eleventh person, who
17 happens to be the plaintiff, says X, and that plaintiff is
18 unbelievable, I don't have to go to trial as long as there's
19 nobody outside saying not X.

20 **MR. TENHOFF:** Well, Your --

21 **THE COURT:** So that's the way it works. That's the
22 way it works.

23 **MR. TENHOFF:** And we're talking about X is, this is
24 the accommodation that best ensure --

25 **THE COURT:** Well, if she said, I thought lollypops

1 should be given to me, or something like that, I'd say fine,
2 that's your view, not ours. But it's not at issue here. It's
3 not the issue to which the other side has disputed the
4 credibility.

5 The way you dispute the credibility, I thought, would
6 be in calling a -- an expert who would say, I want to tell you,
7 after looking at her, the evidence in this case, in my view,
8 this is the accommodation that would best ensure the
9 minimization of the disability in connection with taking the
10 test. That's the -- that's the contest.

11 You see, I look at something like this and I try to
12 figure out, in part, is a trial going to be useful? Is it
13 going to do something more than, what, 300, 500 pages of
14 depositions and so forth has accomplished here? That's what I
15 do.

16 **MR. TENHOFF:** Right.

17 Your Honor, the one key here, all roads lead back to
18 Ms. Enyart saying -- whether it's the experts or anyone else --
19 this is the mechanism that best ensures.

20 **THE COURT:** Well --

21 **MR. TENHOFF:** That's what she says.

22 **THE COURT:** -- leads to the experts and, I guess, to
23 Ms. Enyart. But, you know, the plaintiff comes in -- to tell
24 you the truth, while I appreciate Ms. Enyart, as I would any
25 party to the case, her credibility is not nearly as important

1 as the testimony of the experts and based upon facts which are
2 not in dispute. That's what's important here.

3 **MR. TENHOFF:** But the testimony of the experts comes
4 directly from Ms. Enyart.

5 **THE COURT:** Solely that? Solely that? Then I think
6 that there's --

7 **MR. TENHOFF:** That's the only basis for Dr. Sarraf's
8 recommendation, the ophthalmologist. And if that's the case,
9 then we have -- here we have Miss Enyart --

10 **THE COURT:** Dr. Sarraf isn't an expert on the issue
11 of best --

12 **MS. LEVINE:** He's not, Your Honor.

13 **MR. TENHOFF:** And then we can look -- then we can
14 look at Mr. Britton. We can look at Mr. Schroeder. It all
15 comes down to what did she say to them. That's the basis --

16 **THE COURT:** Okay. That's your argument. Thank you.
17 Submitted. And I'll write something.

18 **MR. TENHOFF:** Thank you, Your Honor.

19 **MS. LEVINE:** Thank you, Your Honor.

20 **THE COURT:** Now, I guess the Bar results will be out
21 November 18th. Is that right?

22 **MS. LEVINE:** November 20th, I believe, Your Honor.

23 **THE COURT:** Twentieth?

24 **MS. LEVINE:** However, there's a value in finality. I
25 would point that out. And we hope that we will have a decision

1 on this before then.

2 **THE COURT:** Okay. Thank you.

3 **MR. TENHOFF:** Thank you, Your Honor.

4 (At 10:47 a.m. the proceedings were adjourned.)

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8 **CERTIFICATE OF REPORTER**

9 I certify that the foregoing is a correct transcript
10 from the record of proceedings in the above-entitled matter.

11
12 **DATE:** Friday, October 21, 2011

13 s/b Katherine Powell Sullivan
14 _____

15 Katherine Powell Sullivan, CSR #5812, RPR, CRR
16 U.S. Court Reporter
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